

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Submitted On Briefs September 15, 2009 Session

**IN RE: I.R.J. (d.o.b 11/16/01) and A.W.V. (d.o.b. 09/23/06),
Children Under 18 Years of Age**

**Direct Appeal from the Juvenile Court for Rutherford County
No. TC 951 Jon Kerry Blackwood, Senior Judge Sitting by Designation**

No. M2009-00411-COA-R3-PT - Filed November 18, 2009

The juvenile court terminated the parental rights of the appellant, C.V. (“Mother”), as to I.R.J. and A.M.V. by memorandum and order filed February 3, 2009.¹ The juvenile court found multiple grounds for termination and concluded that termination was in the best interests of the children. Mother appeals. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed and
Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Gary N. Patton, Murfreesboro, Tennessee, for the Appellant.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, Douglas Earl Dimond, Assistant Attorney General, and Amy Teresa McConnell, Assistant Attorney General, for the Appellee, Tennessee Department of Children’s Services.

OPINION

I. Background and Procedural History

I.R.J. and A.M.V. came to the attention of the Tennessee Department of Children’s Services (“DCS”) on November 10, 2006. DCS received a report that seven-week-old A.M.V. was malnourished and suffered from abuse. The report disclosed similar claims of abuse and environmental neglect regarding the four-year-old child, I.R.J. DCS received a second referral after doctors at the Middle Tennessee Medical Center (“MTMC”) diagnosed A.M.V. with failure

¹The juvenile court also terminated the parental rights of K.L.J. as to I.R.J. in the February 3rd order. The juvenile court terminated the parental rights of R.K. as to A.M.V. on April 2, 2009, after a separate hearing arising out of the same petition. Neither K.L.J. or R.K. appealed the court’s decision.

to thrive.² Dr. Dexter Woods (“Dr. Woods”), the emergency room physician, explained that Mother transported A.M.V. to the hospital at the request of local authorities. Mother believed A.M.V. was in good health and hoped to receive a well-baby certificate to present to police. Dr. Woods, however, immediately noticed the dire condition of A.M.V. and was surprised at the lack of concern shown by Mother. He described A.M.V.’s appearance on arrival as “gaunt” and “very thin and sickly looking.”

DCS family services worker Carrie Perdue (“Ms. Perdue”) investigated the referral arising out of A.M.V.’s diagnosis of failure to thrive. Her inquiry on the possibility of nutritional neglect revealed that A.M.V. weighed no more than when he was born.³ When trying to discover the reasons for A.M.V.’s condition, Ms. Perdue learned that Mother may have been improperly feeding the young child.⁴ DCS alerted to additional concerns when it received reports that Mother’s boyfriend, J.V., directed inappropriate language and physical contact at I.R.J. An unidentified person reported that J.V. kicked I.R.J. at the hospital, but DCS later determined this allegation was unfounded. Police, however, eventually arrested J.V. for disorderly conduct in an unrelated incident and removed him from the hospital.

DCS convened an emergency child and family team meeting on November 13, 2006. Several concerns came to light based on Mother’s statements at the meeting. First, Mother reported that I.R.J. had diabetes, a fact later discovered false. Mother then indicated that I.R.J.’s father, a convicted sex-offender, had abducted and abused I.R.J. During this episode, I.R.J.’s father reportedly gave I.R.J. alcohol and subjected him to physical and emotional abuse. Mother regained care of I.R.J. only after discovering him in a grocery store with the girlfriend of I.R.J.’s father. Mother reported to participants at the meeting that she had not attempted to enroll I.R.J.

² Dr. Woods diagnosed A.M.V. with failure to thrive and malnourishment, but he could not determine whether A.M.V.’s failure to thrive occurred due to environmental or other factors. Dr. Vani Veeramachaneni (“Dr. Veeramachaneni”) later agreed with the emergency room diagnosis. She diagnosed failure to thrive based on psychosocial factors, but admitted at her deposition that her diagnosis may have been based on unfounded allegations contained in the hospital records.

³ The record shows that A.M.V. weighed “7.5” pounds when admitted to the hospital. Dr. Veeramachaneni testified in her deposition that the “7.5” pounds in the admission record equated to seven pounds eight ounces based on the listed metric weight of 3.4091 kilograms. Mother first reported that A.M.V. weighed seven pounds eleven ounces at birth. This is consistent with a report from Oregon that listed the baby’s birth weight as seven pounds eleven ounces. Medical records admitted at trial, however, showed a birth weight of seven pounds zero ounces and alternatively six pounds two ounces. Dr. Veeramachaneni testified that these records could have been recorded retroactively, but concluded that she would revise her diagnosis of failure to thrive if it was established that the baby did not weight seven pounds eleven ounces at birth. We need not address the question of whether A.M.V. was properly diagnosed with failure to thrive because DCS has waived the ground of severe child abuse. The relevant point for our current discussion is that DCS had significant concerns when it removed the children.

⁴ Mother reported feeding A.M.V. foods like cereal, peas, and potatoes. Dr. Veeramachaneni explained in her deposition that it is unacceptable to feed those foods to a seven-week-old baby.

in therapy to address concerns arising out of the alleged abuse.⁵ In addition to Mother's statements, a nurse at MTMC related that A.M.V.'s body was feeding on itself due to malnutrition. To make things worse, the sister of Mother's boyfriend J.V. reported that he molested her as a youth. The child and family team determined that immediate removal was in the best interests of the children.

DCS filed a petition to adjudicate the children dependent and neglected on November 17, 2006. The juvenile court entered a protective custody order granting DCS custody that same day. Mother later agreed at a preliminary hearing that probable cause existed to believe the children were dependent and neglected and that the children should remain in DCS' custody. DCS placed the children with foster parents after it was unable to locate a suitable relative placement.

DCS conducted a second child and family team meeting on December 4, 2006, at the Rutherford County Jail where Mother was being held on charges of child abuse. Meeting participants created permanency plans for the children with the concurrent goals of exit custody to live with relative and reunification with Mother. The first set of permanency plans listed five desired outcomes: (1) Mother would provide a home free from safety hazards and would keep the children safe from sex offenders and other inappropriate persons, (2) Mother would provide safe and stable housing and financially support her children, (3) Mother would acquire coping skills needed to deal with mental health issues, (4) Mother would resolve her pending criminal charges, and (5) Mother would develop the parenting skills needed to care for her children.

The actions required to achieve the listed outcomes were multiple. The permanency plans required Mother to provide a safe and stable home, not associate with sex offenders or inappropriate adults, provide a copy of her lease, provide proof of income, develop a plan for transportation, complete a budget, have a psychological assessment with a parenting component, participate in all recommended services, identify a support group or person to rely on, cooperate with her criminal attorney, comply with the terms of her probation, not incur any new charges, participate in a parenting assessment and all recommended services, demonstrate appropriate parenting skills during visitation, and attend medical appointments. The juvenile court ratified the first set of plans on January 23, 2007.

Mother remained in state custody until March 12, 2007, when she pleaded guilty to felony child abuse of a child under six and received a sentence of three-years diversion. DCS thereafter amended its dependency and neglect petition to assert severe child abuse. The juvenile court conducting hearings on DCS' petition over several days from May 2007 to October 2007. The court concluded that A.M.V. suffered severe child abuse and that I.R.J. was dependent and neglected. The court found that DCS made reasonable efforts to address Mother's needs prior to adjudication and relieved DCS of the duty to make further reasonable efforts based on the finding of severe child abuse. The court incorporated its findings into a written order dated November

⁵ Mother testified at trial, on the other hand, that she once sought treatment for I.R.J., but could not remember the name of the clinic.

30, 2007. Mother appealed the juvenile court's finding of dependency and neglect, but the circuit court did not conduct a *de novo* hearing in the dependency and neglect case prior to the termination hearing.

DCS drafted a second set of permanency plans on December 20, 2007. The parties changed the goals of the second set of plans to reunification or adoption. The second set of plans maintained the requirements of the first set and additionally required Mother to behave appropriately at visitations, refrain from giving pictures of J.V. to her children, participate in individual counseling, and participate in in-home parenting services and therapeutic visitation. Mother participated in the creation of the second set of plans and signed a document explaining the criteria and procedures for termination of parental rights. The juvenile court approved the plans on March 3, 2008. DCS later drafted a third set of permanency plans that listed adoption as the sole objective, but did not vary the requirements of prior plans.

DCS filed a petition to terminate the parental rights of Mother, K.L.J., and R.K. on April 24, 2008. The petition alleged seven grounds that applied to Mother. The petition sought to terminate Mother's rights based on abandonment by willful failure to support, abandonment by failure to provide a suitable home, substantial noncompliance with the permanency plans, persistence of conditions, severe child abuse, sentence of two or more years imprisonment for child abuse, and mental incompetence.⁶ The petition further alleged that termination was in the best interests of the children.

DCS offered Mother services designed to address her parenting and emotional issues throughout the proceedings. Mother attended eight appointments for counseling with the Guidance Center from August 2007 to February 2008. Mother's counselor eventually recommended no further sessions because Mother lacked an earnest desire to implement the lessons provided. A letter from Mother's counselor explained that Mother consistently maintained she was misunderstood and continuously asserted she had been falsely accused of poor parenting. Mother further believed she had been a good mother to both of her sons and remained confident in her skills as a parent.

Mother rebuffed several subsequent attempts to address her parenting deficiencies, but eventually resumed counseling with Realistic Interventions in November 2008. Angela Brown ("Ms. Brown"), counselor with Realistic Interventions, conducted the sessions at Mother's home. She scheduled weekly two-to-three-hour sessions where the two discussed issues such as proper discipline of the children, important goals for the children, and Mother's role in the lives of the children. Mother continued to maintain she did not need any help. She expressed the belief that her children were not malnourished when DCS' obtained custody and that her recent problems were essentially the result of an elaborate plot constructed by the State of Tennessee. Ms. Brown reported that Mother denied she had an anger problem despite appearing very angry at times.

⁶ DCS withdrew the ground of abandonment for willful failure to support at trial.

Mother, however, did acknowledge suicidal thoughts and admitted to running stop lights hoping someone would hit her and kill her.

DCS' persistent attempts to provide Mother with parenting and counseling services often encountered difficulty due to Mother's erratic behavior. Mother's interactions with Realistic Interventions clearly demonstrated her emotional instability. For example, Mother expressed disgust with the citizens of Murfreesboro and the surrounding community during her counseling session on November 29, 2008. She went on to explain that wished she could detonate a bomb that would eliminate the entire county, sparing only herself and her children. Mother repeatedly referred to Murfreesboro as a backward town and commented that she believed everyone there is stupid. Ms. Brown observed that Mother appeared angry and bitter throughout the counseling session. Mother's comments escalated during the December 18, 2008 counseling session when she threatened the juvenile court judge. She warned the counselor to leave town on the date of her next court appearance and promised to "go crazy" if the judge took away her children. Before the session concluded, Mother admitted that she gone so far as to follow the judge to her home. Mother's counseling sessions with Realistic Interventions ended immediately thereafter.⁷

Mother's participation in supervised visitation was equally volatile, but somewhat more successful. Mother initially exercised visitation with the children at DCS' offices for thirty minutes every other Friday. Melanie Patterson ("Ms. Patterson"), the children's most recent case manager, supervised these visits. Ms. Patterson testified that Mother often violated the rules of visitation by mentioning J.V., speaking in code, and talking about inappropriate subjects. During one visit, Mother held on to A.M.V., grabbed I.R.J., and yelled, "[A.M.V.], when you turn eighteen, you take you and your brother and you run away from this place. You hear me? You run." This upset both children and DCS "had to literally pull the boys out of the room." Mother later volunteered to perform sexual acts on a female staff member if she could have her children back. Ms. Patterson did not recommend increased or unsupervised visitation due to Mother's behavior.

The juvenile court eventually moved visitation from DCS' offices to the Murfreesboro Exchange Club ("Exchange Club"). The stated purpose of the transfer was to provide a "less hostile, neutral setting that is secure and controlled to insure the safety of the minor children." The Exchange Club conducted six supervised visitations from September 26, 2008 to December 5, 2008. Tanya Hobbs ("Ms. Hobbs"), director of the Exchange Club, supervised Mother's visits. Ms. Hobbs testified that she did not normally supervise visits, but learned that prior visits "had been very contentious and had been very difficult." She decided that Mother's case would receive "highest priority in terms of oversight" and described the efforts taken to facilitate Mother's visits as "unprecedented." Ms. Hobbs personally met with Mother on September 23,

⁷ Mother later called Realistic Interventions after the police arrived at her home to investigate the threats. She directed Realistic Interventions, not to send "that [n-word]" back to her house. Mother then repeated, "Yes, that's what I said, that [n-word]."

2008, to thoroughly discuss a detailed list of visitation rules designed to provide a safe and conflict-free environment.

Mother's initial visits were productive. Notes from those visits showed that Mother appropriately interacted with the children. Ms. Hobbs testified that Mother was compliant with her instructions and with Exchange Club rules. Nevertheless, ancillary conversations between Mother and Exchange Club staff soon gave rise for concern. Ms. Hobbs explained that Mother "became more brittle emotionally as the process continued. Her tolerance for the rules diminished. She was less willing to comply." Mother stated in one such conversation, "I don't know why you take my keys. It's not like I'm going to take them. I mean, I know where they go to school. I know their classroom. I know their teachers. If I was going to take them, it would be much easier to do it from their school."

The situation deteriorated rapidly after Ms. Hobbs testified against Mother's request to increase visitation. Mother appeared for a visitation scheduled on December 5, 2008, and indicated she was angry with Ms. Hobbs. Mother continued to reference taking the children and committed several rules violations. The general tenor of Ms. Hobbs' conversations with Mother escalated to the point that Ms. Hobbs felt like she needed to implement additional security measures.⁸ Ms. Hobbs informed Mother that she would have to leave all personal belongings in her car or at the front desk and that she would have to leave her keys at the front desk. She also requested assistance from the court in stationing a law enforcement officer at the center during visits. On December 12, 2008, Mother again stated that if she wanted to take her children she would take them from school and admitted that she had hired a private detective to follow the children. The Exchange Club later received a phone call from an individual purporting to act on Mother's behalf. It is unclear what this conversation entailed, but the center responded by instituting a closed-door policy and allowing only those with appointments or official business to enter.

The juvenile court suspended Mother's visits after a hearing on December 18, 2008. The court explained in an order entered February 6, 2009, that Mother created numerous disturbances and committed several rules violations. The court concluded it was in the best interests of the children to suspend visitation. Ms. Hobbs explained at trial that Mother's behavior fell at the "most extreme end" of the spectrum. She testified, "Do we have rule violations? Absolutely. Do we have families who have to be well managed and closely managed? Absolutely. But we have never had a situation where we have felt that the children were threatened enough to request this kind of security."

⁸ Ms. Hobbs testified that the Exchange Club acted with an abundance of caution. She explained that:

"[Q]uite frankly, it's very unusual for a person in our center who has been court ordered to do visitation with their children to even mention abducting children. It's sort of like talking about bombs in a security line at the airport. You just don't do that even in jest because of the context of where you are."

Senior Judge Jon Kerry Blackwood, sitting by designation of the Tennessee Supreme Court, conducted the termination hearing in January 2009. Mother was incarcerated, but present in court for the hearing. The court found clear and convincing evidence to support a finding of failure to remedy the persistent conditions that prevented the return of Mother's children, substantial noncompliance with the requirements of Mother's permanency plans, severe child abuse, sentence of more than two years imprisonment for severe child abuse, and mental incompetence. The court terminated Mother's parental rights after concluding that termination was in the best interests of the children. Mother timely filed a notice of appeal.

II. Issues Presented

Mother presents the following issues for review as restated:

(1) Whether the juvenile court erred when it admitted and relied upon the court's prior order on dependency and neglect that was on appeal to the circuit court

(2) Whether the juvenile court erred by not granting Mother's motion to reconsider the court's ruling on dependency and neglect before proceeding in the termination hearing,

(3) Whether the juvenile court erred by proceeding with the termination hearing while Mother was incarcerated,

(4) Whether the juvenile court erred when it allowed DCS' expert to testify at trial over Mother's objection, and

(5) Whether clear and convincing evidence established grounds for termination. Mother has not raised the issue, but we will nevertheless consider whether termination is in the best interests of the children.

III. Standard of Review

This Court reviews a trial court's findings of fact *de novo* upon the record, according a presumption of correctness to the findings unless a preponderance of the evidence is to the contrary. Tenn. R. App. P. 13(d). This Court will not reevaluate the determinations of a trial court based on an assessment of credibility unless clear and convincing evidence is to the contrary. *In re M.L.D.*, 182 S.W.3d 890, 894 (Tenn. Ct. App. 2005) (citation omitted). This Court reviews the record *de novo* where the trial court has not made a specific finding of fact. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). No presumption of correctness attaches to a trial court's conclusions of law. Tenn. R. App. P. 13(d); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000).

Tennessee Code Annotated section 36-1-113 governs the termination of parental rights. The Code provides, in pertinent part:

- (c) Termination of parental or guardianship rights must be based upon:
 - (1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and
 - (2) That termination of the parent's or guardian's rights is in the best interests of the child.

Tenn. Code Ann. § 36-1-113(c)(1)-(2) (2005 & Supp. 2009). This two-step analysis requires courts to consider “whether the trial court’s findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.” *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). “Although the ‘clear and convincing evidence’ standard is more exacting than the ‘preponderance of the evidence’ standard, it does not require the certainty demanded by the ‘beyond a reasonable doubt’ standard.” *In re M.A.B.*, No. W2007-00453-COA-R3-PT, 2007 WL 2353158, at *2 (Tenn. Ct. App. Aug. 20, 2007)(*no perm. app. filed*). “Clear and convincing evidence is evidence that eliminates any substantial doubt and that produces in the fact-finder’s mind a firm conviction as to the truth.” *Id.* (citation omitted).

The clear and convincing standard is necessary because parents have a fundamental right to the care and custody of their children. *Santosky v. Kramer*, 455 U.S. 745, 768-69 (1982); *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988). “No civil action carries with it graver consequences than a petition to sever family ties indelibly and forever.” *In re C.M.M.*, No. M2003-01122-COA-R3-PT, 2004 WL 438326, at *4 (Tenn. Ct. App. Mar. 9, 2004) (*no perm. app. filed*). The termination of parental rights eliminates “all of the rights, responsibilities, and obligations of the parent[,]” Tenn. Code Ann. § 36-1-113(d)(3)(C)(i) (2005 & Supp. 2009), and removes a parent’s “right to object to the child’s adoption or thereafter, at any time, to have any relationship, legal or otherwise, with the child.” Tenn. Code Ann. § 36-1-113(d)(3)(C)(iii) (2005 & Supp. 2009). The heightened burden of proof in parental termination cases guards against unwarranted severance of the constitutionally protected parent-child relationship. *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998).

Additionally, “[t]he heightened burden of proof in parental termination cases requires us to distinguish between the trial court’s findings with respect to specific facts and the ‘combined weight of these facts.’” *In re T.L.N.*, No. M2008-01151-COA-R3-PT, 2009 WL 152544, at *3 (Tenn. Ct. App. Jan. 21, 2009) (*no perm. app. filed*) (citing *In re M.J.B.*, 140 S.W.3d 643, 654 n.35 (Tenn. Ct. App. 2004)). “Although we presume the trial court’s specific findings of fact to be correct if they are supported by a preponderance of the evidence, ‘we are the ones who must then determine whether the combined weight of these facts provides clear and convincing evidence supporting the trial court’s ultimate factual conclusion.’” *Id.* (quoting *In re M.J.B.*, 140 S.W.3d at 654 n.35).

IV. Analysis

Our review is made somewhat difficult by the failure to raise or adequately argue the issues presented in the appellant's brief.⁹ The appellant's brief fails to mention, much less argue, the issue of best interests of the children. Nor does the appellant's brief in any meaningful way support the argument that DCS failed to establish grounds by clear and convincing evidence. Counsel for Mother cites a single case in the entire brief. We would have little choice but to find Mother's arguments waived *in toto* under different circumstances. *See* Tenn. R. App. P. 27(a)(7) (requiring argument supported by authority); Tenn. Ct. App. R. 6(a)-(b) (requiring citation to determinative facts and alleged errors); *Bean v. Bean*, 40 S.W.3d 52, 55-56 (Tenn. Ct. App. 2000) (citations omitted) (explaining that appellate courts will not consider an issue not raised or properly argued in the appellant's brief).

This Court nonetheless has discretion to suspend operation of the aforecited rules for good cause. Tenn. R. App. P. 2; Tenn. Ct. App. R. 1(a). Although this Court has found waiver in at least one recent termination appeal, that case did not involve waiver of all termination-related issues. *See In re E.M.S.*, No. M2009-00267-COA-R3-PT, 2009 WL 2707399, at *5 (Tenn. Ct. App. Aug. 27, 2009) (*no perm. app. filed*) (finding waiver of the appellant's best interests argument). We believe the great importance of giving adequate protection to Mother's right to the care and custody of her children is good cause for suspension of the relevant procedural rules in this appeal. *See Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-579 (Tenn. 1993); *see also In re S.L.D.*, No. E2005-01330-COA-R3-PT, 2006 WL 1085545, at *5 (Tenn. Ct. App. Apr. 6, 2006) (*no perm. app. filed*) (stating that "termination cases are of such importance that the decisions made in these cases must be correct and effective appellate review is essential"). We will therefore address the issues presented in turn.

A. Pending Appeal

Mother first argues that the juvenile court erred when it considered the court's November 30th order on dependency and neglect during the termination hearing. Mother contends that the juvenile court erred when it admitted and relied on the order because it was not final while pending on appeal with the circuit court. We interpret Mother's position as submitting that the juvenile court erred when it denied her motion in limine and relied on the order to establish the ground of severe child abuse. Mother does not argue that the juvenile court should have stayed

⁹This Court appreciates and greatly respects the efforts of appointed counsel on behalf of indigent clients. The struggle to provide representation for those least able to afford it is well documented. *See generally* Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (2009), http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf. We understand that appointed counsel often face an uphill battle with difficult clients and difficult cases. The present case is no exception. An attorney who accepts representation must, however, approach the case in a manner befitting the profession. The Tennessee Rules of Professional Conduct require as much. *See* Tenn. Sup. Ct. R. 8, RPC 1.1.

the proceedings pending review of the dependency and neglect order, nor did she raise the issue at trial.

DCS acknowledges that Mother properly appealed the November 30th order and that the circuit court did not conduct a *de novo* trial before the termination hearing. DCS argued at the termination hearing that the November 30th order was final pursuant to Tennessee Code Annotated section 37-1-159(b) and sufficient to establish the ground of severe child abuse.¹⁰ DCS, while not conceding the argument, waives the ground of severe child abuse on appeal. Mother raises no argument that the juvenile court considered the November 30th order when deciding other grounds, nor does she contend that consideration of the order was otherwise prejudicial to her case. We therefore deem moot the question of whether the juvenile court erred in admitting and relying on the November 30th order and proceed to address Mother's remaining issues.

B. Rule 60 Motion

Mother next argues that the juvenile court erred when it refused to hear a motion to reconsider the November 30th order on dependency and neglect pursuant to Tennessee Code Annotated section 37-1-139 and Tennessee Rule of Civil Procedure 60.¹¹ Mother claims that the juvenile court's decision not to hear the motion prejudiced her because medical proof was available to show that A.M.V.'s diagnosis of failure to thrive was due to a medical condition of severe gastroesophageal reflux. Mother argues that this Court should remand this case for further hearing on the initial ruling of severe child abuse. Although Mother raised her motion before the juvenile court as it prepared to conduct the termination proceeding, it appears that her motion pertained to the court's prior order on dependency and neglect.

This Court does not have jurisdiction to entertain Mother's argument on this issue. The Tennessee Supreme Court has recognized that this Court's appellate jurisdiction does not extend

¹⁰ Tennessee Code Annotated section 37-1-159(b) provides that:

An appeal does not suspend the order of the juvenile court, nor does it release the child from the custody of that court or of that person, institution or agency to whose care the child has been committed. Pending the hearing, the criminal court or circuit court may make the same temporary disposition of the child as is vested in juvenile courts; provided, that until the criminal court or circuit court has entered an order for temporary disposition, the order of the juvenile court shall remain in effect.

Tenn. Code Ann. § 37-1-159(b) (2005).

¹¹ There is a question as to whether Mother's "Motion" complies with Tennessee Code Annotated section 37-1-139 and Tennessee Rule of Juvenile Procedure 34, which govern a petition to set aside a finding of dependency and neglect based on newly discovered evidence. *See* Tenn. Code Ann. § 37-1-139(a)(3) (2005 & Supp. 2009); Tenn. R. Juv. P. 34 (b). It is also debatable whether the court refused to hear the motion, or heard and denied the motion. Our disposition of the issue makes it unnecessary to address these concerns.

to matters on direct appeal from juvenile court in dependency and neglect cases. *In re D.Y.H.*, 226 S.W.3d 327, 329-32 (Tenn. 2007); *State, Dep't of Children's Services v. Owens*, 129 S.W.3d 50, 54-55 (Tenn. 2004). Tennessee Code Annotated section 37-1-159 governs appeals arising out of dependency and neglect proceedings and provides that “any appeal from any final order or judgment in an unruly child proceeding or dependent and neglect proceeding, filed under this chapter, may be made to the circuit court . . .” Tenn. Code Ann. § 37-1-159(a) (2005). Because subject matter jurisdiction relates to this Court’s authority to adjudicate a matter, it cannot be waived. *Meighan v. U.S. Sprint Commc’ns Co.*, 924 S.W.2d 632, 639 (Tenn. 1996). This Court must consider whether subject matter jurisdiction exists even if the parties do not dispute the issue. Tenn. R. App. P. 13(b). Mother’s motion to alter or amend seeks to modify the juvenile court’s judgment in the dependency and neglect proceeding.¹² Review of the juvenile court’s disposition of that motion lies with the circuit court. This Court has no authority to consider the issue in the present appeal.

C. Prejudice

This Court similarly need not address whether the juvenile court erred when it conducted the termination hearing while Mother was in incarcerated, but present in court. The precise issue raised is whether the juvenile court erred “when it proceeded with the Termination of [Mother’s] Parental Rights while she was being held in custody for pending criminal charges due to allegations she made indirect threats to [the juvenile court judge] . . .” Mother cites no specific error that resulted from conducting the hearing, but argues in her brief that “it is obvious that the Trial Judge gave great weight to the fact that she was wearing jail clothes” in the assessment of her credibility.

We hold that Mother may not pursue this issue on appeal. “It has long been the general rule that questions not raised in the trial court will not be entertained on appeal . . .” *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983). This rule applies regardless of whether an issue receives little or no attention before the trial court. *In re Adoption of E.N.R.*, 42 S.W.3d 26, 32 (Tenn. 2001) (citing *Mallicoat v. Poynter*, 722 S.W.2d 681, 682 (Tenn. Ct. App. 1986)). Tennessee Rule of Appellate Procedure 36 further provides that an appellate court is not required to grant relief to an appellant who “fail[s] to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.” Tenn. R. App. P. 36(a); *see also Alexander v. Armentrout*, 24 S.W.3d 267, 273 n.9 (Tenn. 2000). Our review of the record reveals no objection to conducting the hearing under the circumstances, nor does the record contain a request for continuance on the basis of Mother being in custody. We agree with DCS that Mother failed to

¹² This Court does have jurisdiction to entertain error alleged in the termination proceeding. It is well established that proper appeal of issues arising in a termination case is with this Court. *See* Tenn. Code Ann. § 37-1-159(g); *In re D.Y.H.*, 226 S.W.3d at 329 (citing Tenn. R. App. P. 3; *Dep’t of Children’s Servs. v. T.M.B.K.*, 197 S.W.3d 282, 289 (Tenn. Ct. App. 2006)). We deem this issue moot to the extent that Mother attempted to allege error arising in the termination case. The only point of dispute relates to the issue of severe child abuse, which DCS has waived on appeal. Further, the deposition testimony at issue was admitted at the termination hearing and is part of the record on appeal.

raise this issue before the juvenile court and failed to take the necessary steps to preserve this issue for appeal. We shall not consider it here.

D. Expert Testimony

Mother's argument that the juvenile court erred when it permitted Dr. Gerald Kaforey ("Dr. Kaforey") to testify at trial is without merit. We review a trial court's decision to admit expert testimony for abuse of discretion. *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 273 (Tenn. 2005). "Generally, questions pertaining to the qualifications, admissibility, relevancy, and competency of expert testimony are matters left to the trial court's discretion." *Id.* (citing *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263 (Tenn. 1997)). Courts will overturn a trial court's decision for abuse of discretion only when the court "applies an incorrect legal standard or reaches an illogical or unreasonable decision that causes an injustice to the complaining party." *Id.* (citing *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002)).

Mother argues that she did not receive proper notice that Dr. Kaforey would appear at trial and that the court failed to give her financial assistance and equal opportunity to have her independent expert appear at trial. The record supports neither assertion. DCS complied with Rule 13 of the Local Rules of Practice for the Juvenile Court of Rutherford County, Tennessee that provides:

In all cases in which the State of Tennessee is a party, lists of all witnesses and exhibits (other than impeachment and rebuttal exhibits) shall, upon request of any party, be exchanged between counsel at least three (3) full judicial days prior to the hearing. If requested, witness and exhibit lists not exchanged may not be used except for impeachment or rebuttal purposes.

The record does not show that Mother requested this information or that Mother filed a request for interrogatories pursuant to Tennessee Rule of Civil Procedure 26.02(4) to discover the identity of the State's expert witnesses. DCS nevertheless filed a "Certificate of Readiness" on Wednesday, January 14, 2009, that listed Dr. Kaforey as a potential expert witness at trial. DCS served this document on Mother's counsel via juvenile court mailbox on January 14, 2009. Mother concedes in her brief that she received this document on Thursday, January 15, 2009. We find nothing to indicate that Mother received insufficient notice that DCS intended to call Dr. Kaforey at trial.

The argument that the juvenile court deprived Mother of an opportunity to present her own expert witnesses is equally unfounded. Mother's brief states, "It would appear that had the indigent Appellant had the resources, Dr. [D]e la Torre could have been subpoena [sic] to give live testimony to repudiate the subjective conclusions of Dr. Kaforey, DCS's hired gun." We see no connection between the failure of Mother's counsel to subpoena or request funds to procure Mother's expert and the admission of the State's witness. The strategic decision of whether to procure live testimony from one's expert or to rely on deposition testimony is not for the court to

make and serves as no basis for excluding an opponent's properly subpoenaed witness. *See In re G.T.B.*, No. M2008-00731-COA-R3-PT, 2008 WL 4998399, at *3 (Tenn. Ct. App. Nov. 24, 2008) (*no perm. app. filed*) (citing *Coates v. Thompson*, 666 S.W.2d 69, 76 (Tenn. Ct. App. 1983) (recognizing the strategic nature of the decision to call a witness at trial). Mother provided no evidence to show that she requested or that the State deprived her of financial resources to present her case. We find no error in the juvenile court's decision to allow Dr. Kaforey to testify. *See Young v. Hartley*, 152 S.W.3d 490, 503 (Tenn. Ct. App. 2004) (finding no error in allowing the defendant's witness to testify where the record did not contain a request for interrogatories and the defendant timely submitted an exhibit and witness list).

E. Grounds

The juvenile court found clear and convincing evidence to support three grounds not waived on appeal. This Court will not reverse for failure to establish grounds so long as a preponderance of the evidence clearly and convincingly demonstrates one of the statutorily provided grounds for termination. *State, Dep't of Children's Servs. v. Mims*, 285 S.W.3d 435, 449 (Tenn. Ct. App. 2008) (citation omitted). The grounds before this Court are mental incompetence pursuant to Tennessee Code Annotated section 36-1-113(g)(8), failure to remedy the conditions which led to the children's removal pursuant to Tennessee Code Annotated section 36-1-113(g)(3), and substantial noncompliance with the requirements of the permanency plans pursuant to Tennessee Code Annotated section 36-1-113(g)(2).

i. Mental Incompetence

Mother argues that DCS did not clearly and convincingly establish the ground of mental incompetence. Tennessee Code Annotated section 36-1-113(g)(8) establishes the ground of mental incompetence and provides:

(8)(B) The court may terminate the parental or guardianship rights of that person if it determines on the basis of clear and convincing evidence that:

(i) The parent or guardian of the child is incompetent to adequately provide for the further care and supervision of the child because the parent's or guardian's mental condition is presently so impaired and is so likely to remain so that it is unlikely that the parent or guardian will be able to assume or resume the care of and responsibility for the child in the near future; and

(ii) That termination of parental or guardian rights is in the best interest of the child;

(C) In the circumstances described under subdivisions (8)(A) and (8)(B), no willfulness in the failure of the parent or guardian to establish the parent's or guardian's ability to care for the child need be shown to establish that the parental or guardianship rights should be terminated[.]

Tenn. Code Ann. § 36-1-113(g)(8)(B)-(C) (2005 & Supp. 2009).

The juvenile court expressly relied on the findings of Dr. Kaforey to conclude that Mother was mentally incompetent. On March 13, 2007, Dr. Kaforey conducted a psychological examination of Mother. The examination included a Parenting Stress Index (“PSI”), Personality Assessment Inventory (“PAI”), clinical assessment, and mental status evaluation. Dr. Kaforey supplemented the information obtained during his evaluation of Mother with collateral information from DCS. He testified that his normal procedure included consulting with DCS to verify information following an interview. Dr. Kaforey determined that Mother’s PSI and PAI scores fell within the normal ranges, but diagnosed adjustment disorder with anxiety, neglect of child, and narcissistic personality disorder. He explained that proper diagnosis required consideration of all relevant factors including elevations in test scores and subjective assessment of Mother’s clinical interview.

Dr. Kaforey determined that Mother was incompetent to raise her children and recommended termination. He based his opinion primarily on the finding of narcissistic personality disorder, explaining that “[n]arcissistic personality disorder (NPD) is a serious emotional disturbance characterized by a grandiose, or extremely exaggerated, sense of self-importance.” His report stated:

Although people with narcissistic personality disorder have an exaggerated image of their own importance, they have vulnerable self-esteems and often don’t like themselves. Therefore, they seek attention that confirms their grandiosity. When feedback doesn’t validate their exaggerated image, they tend to lash out or withdraw.

. . . . When they don’t receive the special treatment to which they feel entitled, they may become very impatient or angry. . . . [P]eople with narcissistic personality disorder value others primarily according to how well those individuals affirm their unrealistic self-image. This limited value of others usually means that people with the disorder aren’t interested in or aren’t capable of perceiving the feelings or needs of others. . . .

Dr. Kaforey concluded that Mother would struggle to address her diagnosis of narcissistic personality disorder. His report explained that:

Treatment for narcissistic personality disorder is generally a difficult, long-term process. The therapist needs time to diagnose the disorder, to understand how it is manifested and to address the narcissistic behaviors. Individual psychotherapy is the most common treatment approach, but some therapists may also integrate group and family therapy.

People with narcissistic personality disorder may be defensive about the process because they were compelled or encouraged to seek therapy by an outside source. They may have sought treatment to address a related problem, such as depression

or job crisis, but are unwilling to address the underlying disorder identified by the therapist.

Most people with narcissistic personality disorder are not amenable to the therapist-client relationship or to therapists' questions or comments. They're likely to engage with the therapist in their normal manner of portraying a grandiose image and seeking affirmation. When the therapist questions the reality of that self-image or problems with particular behaviors, the individual may react defensively, devalue the skill of the therapist or discontinue treatment Medication use is limited, but a doctor may recommend drugs to treat related symptoms, such as depression or anxiety.

Dr. Kaforey elaborated on his findings at trial. He testified that it was not possible for Mother to become an effective parent. He stated, "One, I don't think she believes that she has a problem. Two, she had an aggressive side, an aggressive nature. And, three, I just don't see her having a loving, sympathetic, nurturing side to her that's needed in parenting." He further stated, "In regards to parenting, parenting is about looking out for the best interest of your children. Children come first, not self." Mother, on the other hand, was likely to look out for herself before considering the interests of others. Dr. Kaforey explained that Mother's difficulty in accepting responsibility for her actions was related to her narcissistic personality disorder.

Dr. Kaforey shared his recommendations with DCS. He concluded that it would be in Mother's best interests to receive treatment for narcissism, but believed it would take "considerable time" for her to change her behavior. He testified that successful treatment for narcissistic personality disorder could take between six months and three years and that some persons never successfully modify their behavior. Dr. Kaforey recommended termination because it was his opinion that Mother was incapable of being an effective parent.

Mother's attorney arranged a second evaluation with Dr. Robert De la Torre ("Dr. De la Torre") in November 2007. Dr. De la Torre conducted a clinical interview, PAI, Shipley Institute of Living Scale, and Beck Depression Inventory. Dr. De la Torre stated at his deposition that Mother's PAI scores did not indicate that Mother suffered from any kind of severe mental or psychological illness. He concluded that Mother was capable of functioning as an effective parent. He stated, "There is no historical or testing data to indicate psychosis, substance abuse, severe personality pathology, or other psychological illness that may significantly impact her ability to parent or that may pose a danger to her children." Dr. De la Torre, however, cautioned that Mother was experiencing at least a moderate degree of depression and might benefit from a trial of antidepressant medication.

Dr. De la Torre reviewed the findings of Dr. Kaforey. He stated that PAI scores for persons with narcissistic personality disorder usually show significant elevations for the grandiosity, egocentricity, and dominance scales. Mother's test results were within normal limits in both PAI's and were consistent with Dr. De la Torre's impression from the clinical interview.

Dr. De la Torre concluded that “based on a reasonable degree of psychological certainty, there is not any evidence to suggest the presence of narcissistic personality disorder.” He found “no indication of a significant psychiatric illness that would impair her from adequately parenting her children.” In his opinion, Mother was competent to raise her children and capable of keeping them healthy and safe.

Dr. Kaforey responded at trial that Dr. De la Torre’s findings were incomplete. Dr. Kaforey explained that Dr. De la Torre failed to elicit a substantial amount of relevant personal history and noted a “good deal” of inconsistency in some of the information Mother reported. He explained that it is extremely important for patients to honestly report their personal history and that Dr. De la Torre likely would have made a better diagnosis if given accurate and adequate information. Dr. Kaforey found nothing in Dr. De la Torre’s report that caused him to second guess or reevaluate his original diagnosis.

The juvenile court reviewed Dr. De la Torre’s deposition testimony at trial, but did not mention his diagnosis in its findings. The court expressly found Dr. Kaforey credible and concluded that “Mother is mentally incompetent to provide care and supervision of the minor children and it is unlikely that Mother will be able to assume or resume the care of and responsibility for the minor children in the near future.” The juvenile court also expressly found Mother not credible. The court based its finding on “her manner and demeanor, prior inconsistent statements, and lack of reasonableness in many of her answers.” The court concluded that Mother’s testimony reinforced Dr. Kaforey’s diagnosis of narcissistic personality disorder.

The competing testimony in this case requires this Court to consider the interplay between the preponderance of the evidence standard under which we review findings of fact and the clear and convincing standard required to establish the ground of mental incompetence based on those facts. We first must consider whether a preponderance of the evidence supported the findings of fact related to Mother’s narcissistic personality disorder. We then consider whether the findings supported in the record clearly and convincingly established the ground of mental incompetence.

The first consideration is whether a preponderance of the evidence supported the findings of fact related to Mother’s narcissistic personality disorder when according appropriate deference to the juvenile court’s review of the relevant testimony. This Court in *Estate of Fetterman v. King*, 206 S.W.3d 436 (Tenn. Ct. App. 2006), recognized:

In *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779 (Tenn. 1999), the Supreme Court noted that trial courts are better situated than appellate courts to evaluate the credibility of witnesses. “Accordingly, appellate courts will not re-evaluate a trial judge’s assessment of witness credibility absent clear and convincing evidence to the contrary.” *Wells*, 9 S.W.3d at 783. Similarly, when oral expert testimony is presented, resolving conflicting expert testimony falls “within the province of the

trier of fact . . . and where an expert witness's testimony is supported by the evidence and the trier of fact credits that testimony over others, there is no basis to reverse the court's findings." *Atkins v. State*, No. E2003-01255-COA-R3-CV, 2004 WL 787166, at *5 (Tenn. Ct. App. Apr. 14, 2004), *no appl. perm. appeal filed*. However, no presumption regarding credibility attaches when the testimony is admitted via deposition. *See e.g., Fritts v. Safety Nat. Cas. Corp.*, 163 S.W.3d 673, 679 (Tenn. 2005) ("This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition.").

Fetterman, 206 S.W.3d at 445.

This case involves a finding of credibility and resolution of conflicting expert testimony in favor of the State's expert absent competing live testimony. We believe the correct procedure here is to accord deference to the juvenile court's decision and to review Dr. De la Torre's deposition testimony, along with the record, to determine whether it rebuts the finding that Mother has narcissistic personality disorder. Our analysis is consistent with the recognition that trial courts have discretion to accept the opinion of one expert over that of another. *Johnson v. Mid Wesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990) (citation omitted). It also comports with the Tennessee Supreme Court's recognition that "[t]he weight of the theories and the resolution of legitimate but competing expert opinions are matters entrusted to the trier of fact." *Brown*, 181 S.W.3d at 275 (citing *McDaniel*, 955 S.W.2d at 265); *see also State, Dep't of Children's Servs. v. Baruchman*, No. W2004-02071-COA-R3-PT, 2005 WL 729183, at *10-11 (Tenn. Ct. App. Mar. 29, 2005) (*no perm. app. filed*) (addressing a trial court's reliance on an expert's live testimony over an opposing expert's letter).

Relevant to our review is this Court's decision in *State v. Robbins*, No. W2004-00487-COA-R3-PT, 2004 WL 2715334 (Tenn. Ct. App. Nov. 18, 2004) (*no perm. app. filed*).¹³ *Robbins* involved a trial court's decision to resolve competing expert testimony in favor of the State's expert. *Robbins*, 2004 WL 2715334, at *6. This Court affirmed the trial court's decision to accept the testimony of the State's expert and acknowledged that "[t]he weight, faith, and credit to be given to any witness's testimony lies in the first instance with the trier of fact, and the credibility to be accorded will be given great weight by the appellate court." *Id.* at *11 (citing *In re Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997)). We noted that the State's expert provided additional information to the trial court not contained in the competing expert's testimony. *Id.* The absence of this information confirmed that the competing expert lacked knowledge about facts crucial to the trial court's decision due to his limited experience in the case. *Id.* This Court concluded upon review of the testimony that the evidence did not preponderate against the trial court's finding. *Id.*

¹³ This Court's unreported cases are not controlling, but they may serve as persuasive authority. *See Allstate Ins. Co. v. Watts*, 811 S.W.2d 883, 886 n.2 (Tenn. 1991).

Dr. De la Torre's deposition testimony does not preponderate against the juvenile court's finding that Mother has narcissistic personality disorder. The record confirms Dr. Kaforey's observation that Dr. De la Torre relied solely on Mother's written responses to establish her social and personal history and reveals a number of important inconsistencies and omissions in the facts Mother reported to Dr. De la Torre. The inaccuracy in the information reported to Dr. De la Torre is consistent with Mother's inability to accurately depict her family or social history throughout the proceedings. Mother has inconsistently reported facts concerning her life and the lives of her children.¹⁴ Mother initially reported reading and understanding law books at the age of four, graduating high school at the age of fifteen, attending two years of junior college, receiving a bachelor's degree, and being one year away from becoming a veterinarian. She also reported having an IQ of 138 and attending a truck driving institute at the age of thirteen. She, however, struggled to complete a written test during her consult with Dr. Kaforey and tested at a low-to-average educational level with Dr. De la Torre. The record shows that Mother did not receive a bachelor's degree, was not on track to become a veterinarian, and did not attend a truck driving institute until 2005.

We conclude that Dr. Kaforey's opinion is based on a more accurate depiction of Mother's history. While we are in no position to question the conduct of Dr. De la Torre's evaluation, Dr. Kaforey testified that the failure to consult collateral sources prevented Dr. De la Torre from making a diagnosis based on all the relevant facts. Dr. Kaforey further explained that the tests that Dr. De la Torre conducted lacked reliability because Mother had previously taken the test and was able to project herself more favorably, a phenomenon known as the "practice effect." The juvenile court found Dr. Kaforey credible and concluded that Mother has narcissistic personality disorder. Mother's behavior throughout the history of this case has been consistent with the type of behavior Dr. Kaforey described as signifying the existence of the disorder. The cumulative facts in the record supported Dr. Kaforey's observation that Mother will very likely struggle to address the disorder if she ever admits her need for treatment. We find insufficient evidence to reverse the juvenile court's findings of fact on this issue.

We hold that a preponderance of the evidence clearly and convincingly established the ground of mental incompetence. Dr. Kaforey's report and testimony at trial showed that untreated narcissistic personality disorder is a sufficiently debilitating disorder to meet the standard of mental incompetence set out in the statute. Nothing in Dr. De la Torre's report disputed the fact that a person with narcissistic personality disorder may be mentally incompetent to care for a child. Nor did it rebut Dr. Kaforey's testimony that treatment for narcissistic personality disorder is difficult and can take up to three years. Dr. De la Torre's testimony

¹⁴ The most glaring inconsistency concerned the alleged abuse of I.R.J. Mother initially reported that K.L.J. abducted I.R.J. for three years. She later reported that K.L.J. abducted I.R.J. for three months. This is a major discrepancy with regard to an event one would expect would be hard to forget. Other important inconsistencies concerned the type and amount of food she fed A.M.V., the physical ailments of the children, the reasons for taking A.M.V. to the hospital in 2006, her relationship with her parents, and her overseas travel. Dr. Kaforey explained that it is possible for Mother to tell the truth, but sometimes the different stories get so mixed up that it is hard for her to keep the facts straight.

instead showed that many persons suffering from narcissistic personality disorder do not receive successful treatment. The evidence at trial supported Dr. Kaforey's observation that Mother is unlikely to receive successful treatment for her disorder as she experienced similar failure with counseling for her anger and parenting issues. Mother's behavior before and during the current proceedings illustrated the damage that narcissistic personality disorder can inflict on a family if untreated. The juvenile court had little reason to believe that Mother was capable of appropriately raising her children at the time of the termination hearing or in the near future. We affirm the juvenile court's finding of the ground of mental incompetence.

ii. Persistence of Conditions

Mother argues that DCS did not clearly and convincingly prove the ground of persistence of conditions. Tennessee Code Annotated section 36-1-113(g)(3) establishes a ground for termination where:

The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home[.]

Tenn. Code Ann. § 36-1-113(g)(3)(A)-(C) (2005 & Supp. 2009). A finding on the ground of persistence of conditions is not appropriate unless DCS presents clear and convincing evidence to establish each statutory element. *In re Giorgianna H.*, 205 S.W.3d 508, 518 (Tenn. Ct. App. 2006) (citing *In re Valentine*, 79 S.W.3d 539, 550 (Tenn. 2002)).

The juvenile court found that the conditions that led to the children's removal included Mother's incarceration and lack of parenting skills. The court found that Mother did not acquire the skills needed to parent her children subsequent to removal and that she was incarcerated on the day of the termination hearing. The court determined that the conditions requiring removal of I.R.J. and A.M.V. remained and prevented their safe return to Mother's care. The court concluded there was little likelihood that Mother would remedy these conditions, which would diminish the children's chances for reunification at an early date.

The cumulative facts in the record support the juvenile court's conclusion. Mother consistently denied needing help with her parenting skills. Her inability to accept responsibility

for her parenting failures prevented her from implementing the lessons offered at parenting classes and eventually led to the discontinuation of classes. Mother's anger and emotional issues, which she generally refused to address, prevented her from receiving additional instruction. The record does not clearly establish why Mother was incarcerated at the time of the trial, but shows that she was incarcerated. Mother conceded this fact in her brief. We find no error in the juvenile court's conclusion that DCS clearly and convincingly established the ground of persistence of conditions.

iii. Substantial Noncompliance

Mother next challenges the juvenile court's finding of substantial noncompliance with the statement of responsibilities in her permanency plans. Tennessee Code Annotated section 36-1-113(g)(2) establishes a ground for termination if "[t]here has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4." Tenn. Code Ann. § 36-1-113(g)(2) (2005 & Supp. 2009). Termination for substantial noncompliance is warranted only when the plan's requirements "are reasonable and related to remedying the conditions which necessitate foster care placement." *In re Valentine*, 79 S.W.3d 539, 547 (Tenn. 2002)(citing Tenn. Code Ann. § 37-2-403(a)(2)(C)). The determination of whether noncompliance is substantial compares the degree of noncompliance with the importance of the unmet obligation. *In re M.J.B.*, 140 S.W.3d 643, 656 (Tenn. Ct. App. 2004). "Trivial, minor, or technical deviations from a permanency plan's requirements will not be deemed to amount to substantial noncompliance." *Id.* at 656-57 (citations omitted).

The juvenile court found substantial noncompliance with the requirements of Mother's permanency plans based on Mother's discussing the case and J.V. with her children, providing the children with pictures of J.V., making no meaningful attempt to benefit from counseling, failing to abide by the rules and regulations of supervised visitation, and failing to demonstrate the acquisition of appropriate parenting skills. The court found that DCS made reasonable efforts to provide services to Mother and that Mother failed to avail herself of the services offered. Mother does not raise the issue of reasonable efforts or the question of whether the requirements of the permanency plans were reasonably related to the conditions that required removal. Having reviewed the record, we affirm the juvenile court's finding that DCS clearly and convincingly established the ground of substantial noncompliance.

F. Best Interests

We proceed to consider whether termination of Mother's parental rights is in the children's best interests. Termination of a parent's rights and responsibilities is appropriate only when clear and convincing evidence establishes that termination is in the best interests of a child. Tenn. Code Ann. § 36-1-113(c)(2). The General Assembly has established a non-exhaustive list of factors to consider when determining the best interests of a child:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i)(1)-(9) (2005 & Supp. 2009).

The juvenile court found termination was in the best interest of the children for the following reasons:

- (1) That [M]other has made no effort to benefit from services offered by DCS and is unlikely to make an effort to benefit from further services.
- (2) Mother refuses to acknowledge that she has a mental disorder that needs to be addressed.
- (3) Mother has failed to address the issue of her anger.
- (4) Mother's failure to address these issues makes it unsafe for the minor children to be reunited with mother.

- (5) Mother's visitation has been on a limited basis. The minor children appear to be more preoccupied with toys than their affection for mother during these sessions.
- (6) During visitation sessions, [M]other's behavior has been disruptive. Visitation has been suspended at times.
- (7) The minor children appear anxious and nervous prior to visitation sessions.
- (8) That a meaningful parent-child relationship has not been established since the initial removal. [I.R.J.] refers to his mother [by name], not as "Mother."
- (9) The minor children have adapted to the care, control and custody of the foster parents. The children are healthy and attending school or counseling sessions. Their medical needs have been addressed. The minor children regard the foster parent as "Mother."
- (10) The foster parents provide a safe, secure environment.
- (11) The mother has been convicted of child abuse.
- (12) That [M]other's mental and emotional status would be detrimental to the minor children.

The record strongly supports the juvenile court's findings. Mother consistently maintained that she did not need help with her anger or parenting issues and refused services to address those issues. She consistently refused to believe that she did anything wrong and denied responsibility for her circumstances. Mother placed blame on others and attributed the removal to a plot by the State to deprive her of her children. Mother's contempt for the court and for those offering assistance impeded her ability to demonstrate fitness as a parent. For example, Mother often yelled and cursed at DCS employees. DCS encountered difficulty dealing with Mother because of her angry outbursts. Mother's case manager explained that "I really didn't know exactly how to say things to her because I didn't want her to get upset or angry. That was really a main issue is trying not to say things that would trigger her."

Mother continued to make poor decisions throughout the proceedings. Mother married J.V. after the children came into state custody with full knowledge that doing so would impair her ability to regain custody of her children. J.V.'s arrest and other inappropriate conduct throughout the case cast further doubt on his role as an appropriate influence in the children's lives. Mother's decision to marry J.V. was a reflection on her judgment as a parent. This decision was consistent with her relationship with K.L.J. and her decision not to seek treatment

for I.R.J. These actions supported Dr. Kaforey's conclusion that Mother "makes poor choices not only in her life . . . but also in the lives of [I.R.J.] and [A.M.V.]."

The record further shows that Mother has little connection with her children. I.R.J. calls the foster parents "Mama" and "Papa" and refers to Mother by her full name. During her most recent visits, Mother attempted to engage the children, but the children did not attempt to engage with Mother. Ms. Hobbs testified that she did not observe a parent-child relationship from the children's perspective. The children, however, are thriving with the foster parents. A.M.V. quickly recovered after being placed in the care of the foster parents and was no longer failure to thrive in January 2007. I.R.J. received substantial counseling and therapy to address his behavioral, cognitive, and trauma issues. The foster mother testified at trial that the therapy vastly improved I.R.J.'s behavioral problems. The foster parents have expressed a desire to adopt the children.

We acknowledge that not all factors run contrary to Mother's position. There is no question whether Mother maintained regular visitation with her children or supported them while they were in DCS' custody. Records of Mother's interaction with the children during visitation indicate that Mother conducted herself appropriately while in the children's presence. But the comparative weight of these factors is insufficient to deter a finding that termination is in the best interests of the children. The General Assembly has provided that if "the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child, which interests are hereby recognized as constitutionally protected and, to that end, this part shall be liberally construed." Tenn. Code Ann. § 36-1-101(d) (2005). We affirm the juvenile court's decision that DCS clearly and convincingly established that termination is the best interests of the children. To the extent there is conflict here, we conclude that the best interests of I.R.J. and A.M.V. weigh in favor of terminating Mother's parental rights.

V. Conclusion

For the foregoing reasons, we affirm the juvenile court's judgment terminating the parental rights of Mother. Costs of this appeal are assessed to the appellant, C.V.

DAVID R. FARMER, JUDGE